IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

(1)S.B.Civil Misc. Appeal No.1411/2005

Gomti Devi and another vs. Ashok Bhandari and another.

(2)S.B.Civil Misc. Appeal No.1397/2005

Murlidhar Nagar vs. Vijaymal Jain and another.

Date of Judgment : 16.5.2006

HON'BLE MR. PRAKASH TATIA, J.

Mr. SD Purohit, for the appellants.

Mr. SC Maloo, for the respondent.

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REPORTABLE

Heard learned counsel for the parties.

These two appeals are by two different appellants but the facts of the two cases are so intermingled that they are required to be decided by common judgment.

Both the appellants are aggrieved against the order of the trial court passed in two misc. applications filed under Order 39 Rules 1 and 2 CPC dated 19.9.2005 in two separate suits. The trial court allowed the injunction applications filed by the plaintiffs/respondents and restrained the appellants/defendants – purchasers of the plot in dispute by registered sale deed, from alienating the property and from parting with possession of the plot in dispute and further restrained them from raising any construction over the plot in dispute.

It will be worthwhile to mention the relationship of the persons who are involved in the land dealing. One Bhoor Chand – defendant in civil original suit no.36/2005 and another Sampat Raj – defendant in civil original suit no.37/2005 are the owners of two different plots described in the respective plaints. Bhoor Chand is brother-in-law of Sampat Raj. According to the plaintiffs, by oral agreement, defendants Bhoor Chand and Sampat Raj agreed to sell their plots for a consideration of Rs.5,60,000/- for each plot. Bhoor Chand agreed to sell the plot to Ashok Bhandari whereas Sampat Raj agreed to sell the plot to Vijaymal Jain. At the time of oral agreement, both sellers were paid Rs.60,000/- each for their respective plot and thereafter, both Bhoor Chand and Sampat Raj executed agreements for sale of the respective plots on 10.3.2003 and at that time, both the sellers received Rs.2,40,000/- each thereby both the sellers received Rs.3 lakhs each in total by 10.3.2003 against the total sale consideration of Rs.5,60,000/-. In

the agreements executed by both the sellers in favour of the two plaintiffs, one Hasti Mal Chhajerh is the attesting witness. This Hasti Mal Chhajerh is brother-in-law of Seller Sampat Raj. Therefore, these three persons – 2 sellers and 1 attesting witness are closely related to each other. Both Bhoor Chand and Sampat Raj are the attesting witness in the agreement to sell executed by each another. In the agreement dated 10.3.2003 alleged to have been executed by Sampat Raj, one Surendra Jain also put his signatures as attesting witness in addition to Hasti Mal Chhajerh.

In the agreements, it has also been provided that since the land in question is a small piece of agriculture land and was property of Jodhpur Model Cooperative Housing Society Ltd., Jodhpur, therefore, the sellers shall deposit Rs.100/- per square meter with UIT, Jodhpur and in case, any more amount will be demanded on this account by the UIT for the plots in question, then the plaintiffs shall deposit the said excess amount in UIT, Jodhpur. It is also provided in the agreements that before execution of the sale deed, the sellers shall obtain the patta for the plots in dispute from the UIT, Jodhpur and shall get it registered and thereafter, they will give a notice to the purchasers informing them that they have performed their part of contract and thereafter, the purchasers shall pay the balance amount to the sellers and shall execute proper sale deed in their favour.

According to both the plaintiffs, they requested their sellers several times for execution of the sale deed after

completion of all the formalities in terms of the agreements dated 10.3.2003 of getting the proper deed from UIT, Jodhpur. According to the plaintiffs, the vendors always assured that they will complete the formalities but since there was stay against the grant of any patta or lease by the UIT by regularisation or otherwise, therefore, the vendors could not obtain the patta/lease deed from UIT and, therefore, sale deeds were not executed in favour of the plaintiffs. The plaintiffs believed and did not insist more.

On 26.8.2005, the plaintiffs found that some construction activities have been started by some persons on the plots in question and on enquiries, they found that the appellants are proposing to raise construction over the plots. Plaintiff Ashok Kumar was informed by Ganesh Ram, husband of present appellant Smt. Gomti, that the plot has been purchased by his wife from Bhoorchand and appellant Murlidhar Nagar informed plaintiff Vijaymal Jain that he has also purchased the plot from Sampat Raj. The prospective purchasers/plaintiffs immediately contacted the sellers through Hastimal Chhajerh, attesting witness and close relative of both the sellers, as the sellers were residing at Barmer. The sellers gave vague replies and they told that when they will come to Jodhpur, they will explain all the facts.

The plaintiffs apprehending illegal construction on their purchased plots filed the suit for specific performance of contract with a plea that in case any documents have been got executed by the appellants, then

those documents are null and void, against the interest of the plaintiffs. It is also submitted by the plaintiffs that they were ready and willing to perform their part of the contract. In addition to the above, the plaintiffs further took a plea that the sellers collusively did some act but said acts of sellers cannot affect the rights of the plaintiffs by virtue of oral agreement dated 1.3.2003 and written agreement dated 10.3.2003. In the suit for specific performance of contract, the plaintiffs also prayed relief of permanent injunction that the defendants, which include the original owners of the plots and subsequent purchasers, be restrained from alienating the plots in question and be restrained from raising any construction over the plots. The plaintiffs placed on record the original agreements to sale in their suits along with copy of sketch map of the area.

The defendants were served with notice of the injunction application, upon which the defendants – original owners of the plots and appellants - purchasers of the plots filed their replies to the injunction application. The sellers supported the case of subsequent purchasers and denied the agreements to sale set up by the plaintiffs. In both the cases, attesting witness Hastimal Chhajerh submitted his affidavit in support of the plaintiffs and admitted his signatures on the agreements and also submitted that Bhoor Chand and Sampat Raj entered into agreement to sale in favour of both the plaintiffs on 1.3.2003 and thereafter written agreement were also

executed by the vendors in favour of both the plaintiffs.

The appellants/defendants submitted reply to the injunction applications and stated that they purchased the suit property from Bhoor Chand and Sampat Raj respectively by registered sale deeds dated 17.1.2004 and they are in occupation of the plots in dispute. They have right to raise construction being owners of the plots. The appellants submitted that the agreements dated 10.3.2003 are fabricated documents and the signatures of sellers have been forged on the agreements which is apparently clear from the comparison of the signatures which are on the agreements dated 10.3.2003 with the registered sale deeds dated 17.1.2004 executed in favour of the appellants by the sellers. It is also submitted that the persons involved for and on behalf of the sellers including the attesting witnesses are closely related to each other is admitted fact whereas the purchasers have no relations with them and are even not belonging to the caste of the persons who are involved in these transactions.

According to learned counsel for the appellants, the oral agreements set up by the plaintiffs are of 1.3.2003 and written agreements are dated 10.3.2003. All surrounding circumstances would also show that the agreements have been executed with intention to defraud the appellants-purchasers by the persons closely related to each other. The purchasers had no notice of the agreement to sell and the sellers have admitted execution of the sale deeds in favour of the appellants. Conduct of Hastimal Chhajerh

shows that he may be man behind the conspiracy to deprive the appellants from the plots. It is also submitted that the plaintiffs in both the cases did not do any effort for getting the sale deeds from vendors in two and a half years, which is apparent from the facts pleaded in the plaints itself. It was provided in the agreements that the sale deed should have been registered within one month (obviously from the time of obtaining proper deed from the UIT) but the suit has been filed after more than 2½ years, that too only because appellants started construction over the plots and not because, that even after 2½ years, the plaintiffs wanted that they should get the possession of the plots and the sale deeds be executed by the vendors. Learned counsel for the vendors further submitted that even the trial court held that the appellants are bonafide purchasers of the plots in dispute. The trial court despite of said finding granted injunction order against the appellants, the bonafide purchasers. It is also submitted that the plaintiffs have not pleaded and placed on record any fact or evidence to show that the appellants could have knowledge of alleged agreements of the plaintiffs.

It is also submitted that there was specific argument of the appellants that the Court should compare the signatures of the two deeds but the trial court though held that by agreement to sale, no right, title or interest is created in the property (in favour of the plaintiffs-respondents) but it is only a principle of law. According to learned counsel for the appellants, can it be said that said principle of law not meant for application ?

According to learned counsel for the appellants, the finding on issue of comparative hardship and balance of convenience is perverse. The trial court held that since the appellants are bonafide purchasers, and if they will succeed, they will able to get the price which they paid to the seller and they can also claim interest over it, therefore, the trial court was under an impression that in the matter of dispute about immovable property, the sale consideration and interest can be sufficient compensation to the rightful bonafide purchasers. While doing so, the rial court did not consider how the same relief cannot be adequate for the persons who are coming with mere agreement to sale, therefore, the trial court put two persons at different levels while assessing the comparative hardship and balance of convenience and measured the two persons with different yardsticks.

Contesting it seriously, learned counsel for the respondents/plaintiffs in both the appeals vehemently submitted that the order of the trial court is just and proper and has been passed after considering the facts of the case. It is submitted that the sellers agreed to sell the plots in favour of two plaintiffs for a consideration of Rs.5,60,000/- each in the year 2003 whereas sold the plots for consideration of only Rs.1,44,000/- for each plot in the year 2004. The sale consideration shown by the appellants in the sale deeds and shown by the sellers clearly demonstrate that the sale transactions dated 17.1.2004 in favour of the appellants are only paper

transactions. It is also submitted that as against the total cost of Rs.1,44,000/- for one plot, the seller has already received Rs.3,00,000/- from the plaintiffs for each plot. It is also submitted that the sellers were knowing it well that they already entered into the agreements for sale of the plots and executed the agreements on 10.3.2003, therefore, it appears that the sellers have executed the sale deed by changing their signatures. According to learned counsel for the plaintiffs/respondents, at this stage, it cannot be said that the signatures on the agreements dated 10.3.2003 of the plaintiffs are not of the sellers. It is also submitted that even if there may not be more reasons in the impugned orders passed by the trial court allowing the injunction applications of the plaintiffs, still there is no reason for interference of this Court in such a matter of grant of injunction where the relief has been granted to maintain status quo, may it be by restraining the appellants from raising construction over the plots in dispute.

It is also submitted that there are catena of judgments including of Hon'ble Apex Court as well as of this Court wherein it has been laid down as a rule of law that no one should be permitted to alter the suit property during pendency of the suit. It is also submitted that even when conditional order was passed permitting alienation by executing sale deed incorporating the fact of pendency of litigation and permitting construction over the property by obtaining written undertaking that in case, the person will loose in litigation, he will remove the structure at his

own cost, has been reversed by the Hon'ble Supreme Court in the case of Maharawal Khewaji Trust (Regd.) Faridkot vs. Baldev Dass reported in AIR 2005 SC 104. It is also submitted that similar view was taken by this Court also in the cases of (1) Bhagwati Prasad vs. Shakur reported in 2001(4) WLC 331 and (2) Peer Gulam Naseer vs. Peer Gulam Jelanee reported in 1988 (2) RLR 871 and by Mumbai High Court in the case of Suresh Sopab Kadam & Ors. vs. Jagannath Genu Kadam and ors reported in 1993(1) CCC 53. According to learned counsel for the plaintiffs, a serious debatable question has arisen in the suit, therefore, by allowing the appellants to raise construction will seriously prejudice the plaintiffs' interest.

According to learned counsel for the plaintiffs, since the plots could not have been sold without completing the formality of payment of certain costs for plot to UIT, Jodhpur and there was stay against the issuance of the patta or lease deed by the UIT, therefore, the time did not come for seeking enforcement of the contract. It is also submitted that the limitation for filing the suit for specific performance of contract is three years from the date of refusal by the vendor. In this case, it was obligation upon the sellers to obtain proper deed and serve a notice upon the plaintiffs/purchasers. The sellers did not do so, therefore, it cannot be said that the plaintiffs did not comply any part of the obligation under the agreement.

I have considered the submissions of learned counsel

for the parties and perused the record.

So far as the orders of the trial court passed in two applications filed under Order 39 Rules 1 and 2 CPC are concerned, it was difficult even for the learned counsel for the plaintiffs/respondents to justify because of the reason that the orders do not mention all the facts of the case and arguments submitted for both the parties and, therefore, learned counsel for the respondents argued on facts and submitted grounds which are not mentioned in the impugned order. Learned counsel for the plaintiffs tried to support the orders with the help of entire material on the record which according to learned counsel for the plaintiffs indicate that the conclusion in the orders dated 19.9.2005 is correct one.

Granting of injunction is a serious matter and refusing of injunction is equally serious. If the court will not properly appreciate the facts of the case at the time of granting injunction, a havoc may be created and it may result into increasing unnecessary litigations because of the reason that after obtaining injunction from the Court, it is very easy to prolong the litigation for indefinite period. If we ignore this fact, then we cannot impart justice to the people. Therefore, it was and it is the duty of the trial court to give sufficient time while deciding injunction applications in seriously disputed matter affecting the right, title and interest in immovable properties. The orders may be brief, but must be self contained so that the parties may know that whether they

should feel satisfied with the order of the trial court and may not prefer appeal and should proceed with the trial of the suit for ultimate relief. From the order only, parties may decide that whether they should challenge it. And if orders are not in conformity with legal requirement, and are not passed as speaking order, not only the parties but the learned advocates will also advise to prefer appeal against the order and the appellate court may not have option but to entertain appeal because of poor orders as appellate court would not have sufficient material from order itself for restraining it from entertaining appeals against discretionary orders of the trial courts. If the facts and arguments are mentioned and consideration is apparent from the orders, the appellate court may not even entertain appeals in such matter of discretionary relief which are meant for protecting the property or rights of the parties during pendency of the suit.

The trial court in its order more than once held that the appellants are bonafide purchasers. If it is so and the appellants are in possession of the suit property, mere agreement to sale may give rise to seek for specific performance of contract against the sellers but how it can affect the interest of bonafide purchasers, has not been considered by the trial court. The finding of the trial court that the appellants are bonafide purchasers is also a finding only prima-facie but for grant of injunction, only prima-facie findings are relevant. The trial court mentioned that by payment of sale price along with interest to the bonafide purchasers, the rights of bonafide

purchasers will stand fully satisfied. Said plea in itself is contrary to law even for seeking specific performance of contract because the law itself provides that in a transaction of immovable property, money shall not be adequate compensation.

Assuming for the sake of arguments that the trial court's view was correct that the bonafide purchaser's rights can be protected by payment of amount which he paid to seller along with interest, then why the same principle has not been applied by the Court while considering the rights of the plaintiffs on the basis of mere agreement to sale. The trial court also did not consider where the balance lies. Raising of construction or altering the immovable property during pendency of litigation normally cannot be permitted, is the law settled but exceptions are there. When it is seriously contended by the vendees that even during pending litigation, they be permitted to raise construction over the plots in dispute, then the vendees can so submit only in exceptional case. Whether vendees have made out any such exceptional case or not, is also the point which should have been decided by the court below. Exceptions are there because of various reasons and cumulative effect of all facts and circumstances are required to be seen from the facts of each case for the purpose of granting relief. Therefore, it will be appropriate to recapitulate the facts of the case again for finding out whether the trial court rightly decided the issue of prima-facie case in favour of the plaintiffs because of the simple reason that the trial court's orders

are of no help to this Court for finding out what facts or reasons prevailed over the court below for granting relief to the plaintiffs and for restraining the defendants, apart from the fact that the reasonings, whatever, given by the court below are legally wrong or are self contradictory.

Before that, it will be appropriate to reiterate that all observations made even by High Court in a proceeding arising under Order 39 Rules 1 and 2 CPC are only prima-facie findings and not binding upon even the subordinate courts and this has been reiterated despite the fact that it is settled position of law but because of the reason that some times, some observations still may be construed against one party and in favour of another party.

The plaintiffs' case is that they entered into agreement for purchase of the plots in question on 1.3.2003 for a consideration of Rs.5,60,000/- and paid Rs.60,000/- on 1.3.2003 and thereafter paid Rs.2,40,000/- on 10.3.2003 and there was a condition in the agreement to sale that the sellers shall obtain proper deed from the UIT before serving notice upon the plaintiffs. Thereafter only, the plaintiffs could have asked for execution of the sale deed in their favour. The facts on the face of it may be attractive and stay by the local body itself against the grant of patta or deed may be persuasive but we cannot ignore this fact that the plaintiffs have not disclosed when prohibition was put by UIT. Whether at the time when the plaintiffs entered into agreement to purchase, said prohibition was there or not ? When this stay was vacated

by the UIT ? The plaintiffs, contrary to their own pleading that they could not have asked for registration of the document in view of the bar put by the UIT, Jodhpur or State Government, alleged that they requested the sellers to execute the sale deed even during this period (without disclosing how and when). The plaintiffs' plea is self contradictory. If there was a bar and the plaintiffs were knowing it, then there was no occasion to ask for registration of the document. The plaintiffs also did not disclose when they asked the sellers to execute the sale deed after 10.3.2003 because that fact would have thrown good light on the question that on what time, the sellers avoided execution of the sale deed in favour of the plaintiffs, if there was any agreement. Be it as it may be vendors sold their plots on 20.1.2004 by registered sale deed to the appellants and if there was any ban against issuance of lease deed and patta by the UIT, Jodhpur than that ban must have been lifted before 20.1.2004, than suit for specific performance has been filed after more than 1 year 7 months from said date.

The suits are not filed by the plaintiffs because the bar was lifted by the UIT or the State Government against the issuance of patta or lease deed but the suit has been filed because the appellants started construction activities over the plot in dispute. If the purchasers would not have started construction, the plaintiffs may not have filed the suit for specific performance of contract despite the fact that at the time of filing of the suit, more than 2½ years have already passed. The contention of

learned counsel for the plaintiffs that the limitation for filing the suit for specific performance of contract is three years from the date of refusal by the vendor, cannot help the plaintiffs because of the reason that the suit for specific performance of contract is a suit of special nature where it is not necessary for court to grant relief of specific performance of the contract even if the plaintiff has proved his agreement for purchase of the property. The relief is discretionary. The discretion can be exercised by the court only when the court has jurisdiction to grant or refuse the relief. If the court looses its jurisdiction to grant the relief, there is no question of discretion of the court. The court is bound to deny the relief. Therefore, in a suit for specific performance of contract, if the suit is barred by time, it is liable to be dismissed but when it is within limitation, then and then only, the Court can consider whether to grant relief to the plaintiffs for specific performance of contract or not. This position is required to be considered by the trial court at the time of deciding the suit but to appreciate the conduct of the parties, this fact can also be taken into consideration that the suit has been filed by the plaintiffs after about 2½ years and that too because of the reason of overt act of the appellants and not because of inaction of the sellers.

This Court looked into the signatures of the sellers on the agreements to sale produced by the plaintiffs and the registered sale deeds executed by the sellers in favour

of the appellants. Admittedly, the signatures on these two documents are different, therefore, in the trial, the court will decide which of the signatures are correct but at this stage, the plea taken by the defendants is relevant because the defendants are having registered sale deeds with photographs of vendors over it and proper attestation by registering authority after identification of sellers against unattested agreements to sale. According to the plaintiffs themselves, the sellers and attesting witness are very close relatives. The sellers are admitting the sale deeds whereas their close relative Hasti Mal Chhajerh has stated that the agreements to sell the plots in favour of the plaintiffs were executed by the sellers, his very close relatives. The sellers denied the agreements in favour of the plaintiffs. This stand has not been explained by these three close relatives, vendors, who are brother-in-laws, and witness Hastimal Chhajerh, who is also brother-in-law of one of the vendor, why these relations are deceiving each other. Mere admitting the agreement by Hastimal may have been one of the fact in favour of the plaintiffs but it appears that the trial court did not carefully read the affidavit of said witness Hastimal Chhajerh. His affidavit is of a close relative of both the vendors and, therefore, his statement was required to be considered with caution. In his affidavit, Hastimal stated that he was the middle man for sale of the plots to the plaintiffs. He also stated that the vendors, his close relatives “in fact” have not sold the plots to appellants. They, the defendants, conspired and to grab the plots

executed the sale deeds. He also stated on oath that the vendors malafidely executed the sale deeds. His deep interest with the plaintiffs and allegations against his close relations are clearly visible from his affidavits but how he came to know that the sale deeds have been executed by the vendor, his relative malafidely and collusively, is not disclosed. The trial court not only ignored this important fact but also ignored the serious implied admission of the plaintiffs and Hastimal Chhajerh as by such stand that the defendants and witness Hastimal Chhajerh have impliedly admitted the signing of sale deeds by the vendors in favour of the defendants/present appellants. The duty was upon the plaintiffs to prove reason for collusion. Who wanted to grab the plots ? They were already in the names of vendor. What was reason for involvement of vendors in case of property belonging to relatives and alleged to have been sold through close relatives who all are of same caste ? But atleast, a serious doubt has arisen because of the fact that agreements in favour of plaintiffs are unattested one and the sale deeds in favour of the purchasers/appellants are registered one and as per the procedure, the thumb impression of the sellers despite the fact that they are literate, are also taken at the time of registration of the document and their photographs are also affixed on the sale deeds and the same is not the position when the agreements, which are not registered, are there. Learned counsel for the plaintiffs submitted that it is not necessary that the agreement should be attested by any authority. That is true

but that does not mean that an unattested agreement can come at par with an attested document merely because attestation of the document is not required by law. Attestation of document gives some more sanctity to the document though that is not the conclusive proof of execution of the document by the executant but at the time of grant of injunction, this fact is relevant and cannot be ignored and that has been ignored by the trial court totally.

The plaintiffs' case is that they purchased the plots for a consideration of Rs.5,60,000/- (each) whereas the appellants claimed that they purchased the plots for price of Rs.1,44,000/- (each) only, therefore, the appellants said purchases is only a paper transaction.

First we can look into the facts that the plaintiffs' agreements to sell have been seriously disputed by the defendants/appellants and the vendors also, therefore, at this stage, without there being prima-facie proof for relying upon the said arguments, the contents are not very much relevant about the sale considerations mentioned in the agreements dated 10.3.2003. Another point is that, if almost major part of sale consideration, out of Rs.5,60,000/-, Rs.3,00,000/- alleged to have been paid to seller but possession of the plots was not taken by the plaintiffs from the vendors. Nothing has been said about the plaintiffs effort to see that atleast the vendors should have deposited the due amount of UIT, Jodhpur against the plots. Therefor,e on the basis of doubtful (prima-facie) documents, the agreements of sale set up by

the plaintiffs, the transaction of sale by the vendors for a consideration of Rs.1,44,000/- (each) cannot be held (prima-facie) to be for low consideration.

In view of the above facts, the totality of the facts, prima-facie reveals that the suits have been filed after delay without sufficient explanation for the delay and has been filed on the basis of unattested agreements with the signature of the sellers which have been denied by the sellers and the appellants/vendors, the trial court itself held that the appellants are (prima-facie) bonafide purchasers of the plots in question and the explanation given by the plaintiffs for the time at which the suit was filed by them (because of overt act of the appellants and not otherwise) makes the case of the plaintiffs weak.

The injunction can be granted even in a suit for specific performance of contract, as submitted by learned counsel for the plaintiffs, who relied upon the judgment of this Court in the case of Bhagwati Prasad vs. Shakur reported in 2001(4) WLC (Raj.) 331. In this case, two matters were decided but detailed reasons and facts are not given and, therefore, it appears that the decision is on facts of the cases only and is not laying down that injunction in all cases of specific performance of contract is required to be granted.

Another judgment of this Court in Peer Gulam Naseer's case (supra) is a decision in which it has been held that when serious question arises in the suit, injunction should be granted to protect the subject matter. This is settled law but raising question is not enough, it must have some

merits also.

Heavy reliance has been placed upon the judgment of Hon'ble Supreme Court delivered in the case of Maharwal Khewaji Trust (supra). In the above case, Hon'ble Apex Court found that the lower appellate court as well as the High Court did not go in to the question of prima-facie case. The Hon'ble Supreme Court thereafter held that, "*...unless and until a case of irreparable loss or damage is made out by a party to the suit, the Court should not permit the nature of the property being changed which also includes alienation or transfer of the property which may lead to loss or damage being caused to the party who may ultimately succeed and may further lead to multiplicity of proceedings.*"

On facts of the case before it, the Hon'ble Supreme Court observed that, "*In the instant case, no such case of irreparable loss is made out except contending that the legal proceedings are likely to take a long time, therefore, the respondent should be permitted to put the scheduled property to better use.* ***We do not think in the facts and circumstances of this case, the lower appellate court and the High Court were justified in permitting the respondent to change the nature of the property by putting up construction as also by permitting the alienation of the property****, whatever may be the condition on which the same is done.*" and further held that, "*Since the facts of this case do not make out any extraordinary ground for permitting the respondent to put up construction and alienate the same, we think both the courts below, namely,*

the lower appellate Court and the High Court erred in making the impugned orders. The said orders are set aside and the order of the trial Court is restored."

The above judgment of Hon'ble Supreme Court in Maharwal Khewaji Trust's case (supra) nowhere laid down that construction on the subject matter of suit cannot be allowed in all cases. It rather laid down that, "...*unless and until a case of irreparable loss or damage is made out by a party to the suit, the Court should not permit the nature of the property being changed...*". Therefore, if plaintiff fails in making out a prima-facie case, case of irreparable injury and balance of convenience in his favour and further the change in property during pendency of suit will or may adversely affect the interest of the plaintiffs, the court can refuse injunction which may allow other party to proceed with the construction, which almost in all cases, barring a few, cannot give any right in favour of the persons, who changes the property.

In a suit for specific performance of contract, admittedly, the plaintiffs are not the owners of the property and in this case, the appellants are admittedly owners of the property. The defendants are in possession of the properties also. On the strength of agreements to sale, the plaintiffs may be entitled to get possession of the property as was than when they agreed to purchase the properties. But the facts referred above cannot be ignored while deciding the matter relating to grant of interim relief. In view of the reasons mentioned above, this Court

is of the view that the trial court did not consider the evidence as well as did not appreciate facts and surrounding circumstances and, therefore, reached to a wrong and self contradictory conclusion. The subject matter is an open piece of land. The consequences of injunction order may be grave because of the reason that by that, not only the seller or the purchaser from the seller is deprived from the enjoyment of the property but he is prevented from raising construction over the plot and it is difficult to assess the escalation in price of construction. The damages which may be caused to the seller or purchaser from the seller by registered sale deed, without notice of prior agreement to sale or who has bonafidely purchased the plot, cannot be assessed because of the reason that at the time of granting injunction, no one can know how much time, the Court will take in deciding the suit finally and by what multiplier, the cost of construction will increase.

Court is conscious that some of the facts out of the facts of this case alone may not be sufficient for allowing construction over the open plots in all cases. Where question of title is involved or substantial allegation of fraud against the person in possession with some proof thereof are available on record or the conduct of such person disentitle him from such indulgence, the court should not allow the change in property during pendency of suit. The normal rule has exceptions also. In the present case, there are allegations of collusion upon the seller and the appellant vendors but prima-facie not substantiated

by any convincing reason apart from the fact that the plaintiffs failed in showing their conduct above board. (However, they shall have opportunity to demonstrate their bonafides in trial of the suit).

In this case, the property is plot, therefore, the plot will remain as plot even if some construction is raised by the purchaser and the plaintiff can be put in possession of the plot after removal of the entire construction which may be raised by the defendant during the pendency of the suit. But reverse is not the position looking to complete facts of the case and the defendant's loss due to not allowing him to construct, cannot be compensated. Had it been a case of building or admitted possession of the plaintiffs and intention of the seller, his buyer defendant was to demolish or dispossess the plaintiffs, then the position would have been different. The above principle permitting construction during pendency of suit cannot be applied in all cases as held by the Hon'ble Apex Court in the case of Maharwal Khewaji Trust (supra). That the normal rule is to maintain status quo with respect to the suit property during the pendency of litigation. While granting relief of injunction against raising of construction over open plot may be different in each case and considerations may be different while granting the relief where construction is already there and where demolition, addition, alteration etc. is apprehended. The relief can be molded depending upon the strongness of prima-facie case of the plaintiff even for an open land against raising construction. The judicial discretion is

required to be exercised while granting injunction and it may not be treated that in all cases, where open land is there, the seller or his purchaser can ask for construction on the plea that they are ready to furnish an undertaking that they will remove the structure.

In this case, as held above, the plaintiffs failed to prove prima-facie case and this Court is of the view that loss to the defendants cannot be assessed and compensation cannot be adequate relief. The defendants/appellants will also have a risk of investing thousands or lakhs of rupees just which may be balancing factor. This Court is of the view that the judgments which have been relied upon by learned counsel for the plaintiffs and which have been delivered in the facts of the case and there are several other judgments and orders by which constructions were allowed on furnishing undertaking by the Court and which are (1) Julian D.J. Harry vs. P.K. Khanna reported in 2002(1) WLC (Raj.) 210 (by me), (2) Fool Kumari Devi vs. Krishna Deo Upadhya & Anr. reported in 1999(1) CCC 252 (Patna) and (3) R.S. Arya vs. T.R. Dewan reported in 1999 (Suppl.) CCC 168 (Delhi). In some of the judgments, the view has been taken that in a suit for specific performance of contract, injunction cannot be granted. These are (1) Sujan Charan Lenka and others vs. Smt. Pramila Mumari Mohanty and others reported in AIR 1986 Orissa 74 and (2) Sarup Singh & Ors. vs. Nirmal Singh & Anr. reported in 1997(Suppl.) CCC 610 (P&H). This Court is of the view that this is a fit case rather say rare case where the court should do the justice to both the parties by allowing the

defendants to raise construction on furnishing their written undertaking before the trial court that they shall remove all structures which they may construct over the plots during pendency of the suit at their costs and shall not be entitled to any equity in their favour on the basis of their raising construction. It is also made clear that the construction should be only after getting approval from the local body for construction. So far as the relief of not alienating the property during pendency of the suit, learned counsel for the appellants has not raised any grievance against that restriction.

Consequently, these appeals deserve to be allowed, hence, allowed, the orders dated 19.9.2005 of the trial court in both the appeals are set aside and the injunction applications of the plaintiffs are dismissed with a condition on the defendants/appellants that the defendants shall furnish an undertaking before the trial court within a period of fifteen days from today that they shall not construct over the plots in question without obtaining permission from the local body for construction and shall not only not alienate the plots but shall not let out the plots to anybody and shall not create any charge over the plots or property or structure from financial institutions and they shall remove all structures which they may construct over the plots during pendency of the suit at their costs and shall not be entitled to any equity in their favour on the basis of their raising construction.

The record of the court below be sent to the court

below forthwith. The court below is requested to decide the suit expeditiously.

(PRAKASH TATIA), J.

S.Phophaliya